IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 214 OF 2006

Smt. Shantabai Yeshwant Umap
and anr. ..Appellants

Vs.

Smt. Sundrabai Dattoba Umap and ors. ..Respondents

Mr. Macchindra Deshmukh i/by Mr. Milind Deshmukh for appellants.
Ms. Lalita Panchakshari for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : April 10, 2007.

P.C.:

1. This second appeal arises from the decree passed by the learned Joint Civil Judge, Junior Division, Ghodnadi at Pune on 31/1/2004 and confirmed by the Lower Appellate Court on 8/12/2005.

2. The present respondent no.1 had filed Special Civil Suit No.1064 of 1987 for partition and separate possession of the ancestral property and to the extent of her share as would be available to her husband Dattoba, who was the brother of defendant nos.1 to 3

and 5 and son of defendant no.4. Defendant nos.26 and 27, who are the present appellants, are the wife and son of defendant no.1 respectively. The suit property was agricultural land at village Pabal bearing Gat Nos.44, 106, 11, 113, 114, 115, 116, 136, 141, 144, 157, 173, 174, 214, 108, 52, 2173, 2143, 2187, 2148, 2142 and house property situated at Jategaon Grampanchayat No.52 and another house situated at Gat No.176 along with one white bullock, three cows, six goats, one bullock cart and agricultural equipments, more particularly described in para 1 of the plaint and it was claimed that all these properties were ancestral properties of a Hindu joint family of Laxman Umap. The plaintiff further claimed that on the demise of her husband she was ill-treated and thrown out her house by the defendants, more particularly defendant nos.1 to 4 and 26 and 27. The suit was contested by defendant nos.1 to 5 and 26 and 27. Defendant No.1 died during the pendency of the suit. The relationship between the parties was admitted, but the defendants contended that the plaintiff was not married to deceased Dattoba. They further claimed that the suit lands in Gat Nos.2142, 2177, 2148, 2143

and 2187 were self acquired properties of defendant no.26 and defendant no.1. The trial court considered the evidence of plaintiff herself as PW 1, Shantaram Wadekar (PW 2), Kisan Umap (PW 3) and the 7x12 extract of the suit lands, PTR of suit house, voters list, copy of statement of Hausaram Umap and Smt. Dagadabai Laxman Umap recorded by the Tahasildar in Dispute Case No. 1727 and the judgment in the said case. It held that the plaintiff was the LR of deceased Dattoba, the brother of defendant nos.1 to 3 and 5 and she had proved that the suit properties were the ancestral properties of the father of the deceased. It further held that the defendant no.26 could not prove that the house properties bearing No.52 was her self acquired property in as much as it was purchased by her. The issue of limitation was also decided in favour of the plaintiff. The trial court further held that the defendants failed to prove that the agricultural land in Gat Nos.2173, 2148, 2143 and 2187 were the self acquired properties of defendant no.1. The suit was, therefore, decreed by holding that the plaintiff and defendant nos.1 to 4 were entitled to partition to the extent of 7/36th share and the defendant no.5 was

entitled to get 1/36th share in all suit properties. As noted earlier this decree has been confirmed in toto by the Lower Appellate Court by dismissing Civil Appeal No.136 of 2004.

3. The learned counsel for the present appellants submitted that the trial court did not provide sufficient opportunity to the defendant nos.26 and 27 to place on record their evidence in support of their case regarding the house property bearing No.52 and the application at Exh.169 for adjournment was wrongly rejected on 16/10/2003 and the order dated 16/10/2003 was refused to be set aside. This issue was also raised before the Lower Appellate Court and though on the face of it these arguments appear to be impressive, on detailed examination, it was revealed that the defendant nos.26 and 27 were determined to defeat the suit by prolonging the trial and they were constantly coming in the way of deciding the due share of the plaintiff- widow. The suit was filed in the year 1987 and the plaintiff’s evidence was completed in the year 1995. The defendant no.26 was not available for recording evidence for a period of five

years though she was represented by a lawyer nor did her son defendant no.27 ever stepped in the witness box during these five years from 1995 to 2000. It was for the first time on 16/10/2000 that the defendant No.26 stepped in the witness box and her examination-in-chief was partly recorded. Thereafter the suit was transferred to the court of Civil Judge, Junior Division at Shirur due to enhancement of pecuniary jurisdiction of that court. The suit was received by the court at Shirur on 8/12/2000 and notices were issued to the parties through the court. These notices were served on the defendant nos.26 and 27, but they did not appear and, therefore, by the order dated 16/10/2003 i.e. almost after three years, the trial court directed suit to proceed on merits by forfeiting the defence of the defendants. On 30/1/2004 the defendants appeared with an application stating that they had changed their advocate and the new advocate made an application at Exh.169 for adjournment and also to set aside the order dated 16/10/2003. This application was rejected. Even in the appeal memo presented before the Lower Appellate Court the appellants did not ever pray for the remand

of the case by restoring the suit from the stage of the examination of defendant no.26, as has been noted by the Lower Appellate Court in its judgment. Even otherwise the record shows that no such document was brought before the trial court and more particularly public documents like copies of 7x12 extract by the defendant nos.26 and 27 in support of their contentions that the house no.52 or the agricultural land located in Gat Nos.2173, 2148, 2143 and 2187 was the self acquired property by Yeshwant or by defendant no.26 during the period of 13 years i.e. from the time of filing of the suit till the defendant no.26 stepped in the witness box on 16/10/2000 before the trial court. Under these circumstances, the prayer made by the learned counsel for the appellants before this court to remand the suit for retrial cannot be accepted. The findings of fact in favour of the plaintiffs have been recorded by the trial court and confirmed by the Lower Appellate Court on assessment of the documentary and oral evidence, as was brought on record by the plaintiffs and once it was established that she was the widow of Dattoba, the brother of defendant nos.1 to 3 and 5 and son of

defendant no.4 and that he died issueless, the decree for the share of the plaintiff would invariably follow. It was pointed by the plaintiffs that the suit lands in Gat Nos.2142, 2173, 2148, 2143 and 2187 were purchased from the joint income of the family and in Gat No.2148 the well was dug from the income of the joint family, whereas remaining properties were ancestral properties. There was no dispute that the plaintiffs and defendants were part of a joint family and at the same time the defendants neither pleaded nor proved that the defendant nos.1 to 3 or any one of them had any other independent source of income so as to acquire the suit land in Gat Nos.2142, 2173, 2148, 2143 and 2187 from such income.

4. Hence this second appeal does not involve any substantial question of law and the same must fail at the threshold.

5. The appeal is hereby dismissed.

6. Oral application for stay of this order is rejected.

(B.H. Marlapalle,J.)